No. 06-370

Supreme Court, U.S.
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In The
Supreme Court of the United States

JESSIE DORADO, INDIVIDUALLY AND AS MOTHER AND NEXT FRIEND OF BRIANA ALEXIS MIRANDA, A MINOR and ON BEHALF OF THE ESTATE OF EDUARDO MIRANDA A/K/A EDUARDO DUARTE, DECEASED,

Petitioners,

v.

THE COUNTY OF EL PASO, TEXAS,

Respondent.

On Petition For Writ Of Certiorari To The Court Of Appeals For The Eighth Judicial District, El Paso, Texas

BRIEF FOR THE RESPONDENT IN OPPOSITION

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QUESTIONS PRESENTED

I. Should this Petition for Writ of Certiorari be granted when the Texas Court of Appeals properly stated the standard of review and the Texas Supreme Court refused a Petition for Review and the only question raised is whether the Court of Appeals improperly applied the standard of review?

II. Did Petitioners waive their right to have Dr. Block, the jail doctor, declared the final policymaker for the County when Petitioners never asked the Trial Court for such a finding and never requested the Trial Court to instruct the jury as to the appropriate policymaker?

III. The Court of Appeals made an undisputed legal finding that the Sheriff was the final policymaker for the jail under Texas law but, after evaluating the facts presented by Plaintiff in the Trial Court, determined that Plaintiffs had failed to prove that the jail doctor was delegated final policymaking authority. Should this Court reject the Petition for Writ of Certiorari where Petitioners' complaint is that the Court of Appeals erroneously determined that the jail doctor was not a final policymaker for the jail?

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CORRECTIONS TO FACTS PRESENTED BY PETITIONERS

There are several inaccuracies in Petitioners' version of the facts in this case.

1. Petitioners state, "A Mexican physician . . . died . . . not having received his seizure medication." The decedent did receive his medicine, as prescribed by Dr. Block. On the evening of March 1 he received 2 milligrams of Ativan. (Ct.R. vol. 12 at 92; vol. 13 at 62).[1] On the evening of March 2, an attempt was made to give him his medicine but he did not respond to his name being called out twice. (Ct.R. vol. 24 at Ex. P-24).

2. Furthermore, Ativan was not Dr. Miranda's seizure medicine. It was self-prescribed medicine that he had been taking for 6 years. Appellees incorrectly cite to the record at 12-85 for the proposition that Dr. Miranda was taking Ativan to treat a seizure disorder. Ms. Dorado's testimony was that her husband had been self-prescribing the medicine for six years to treat sleeplessness problems after the death of his mother. (Ct.R. vol. 12 at 155). She further testified that he was taking five to eight pills per night (10 to 16 milligrams) and one or two during the day. (Ct.R. vol. 12 at 127). He may have taken more during the day of which she was not aware. (Ct.R. vol. 12 at 128).

3. Petitioners state, "The jury found that his [referring to Dr. Block, the jail Medical Director] deliberate indifference caused decedent's death." The

[1] Citations to the record set forth whether it is from the Court Reporter's Record (Ct.R.) or the Clerk's Record (Cl.R.), followed by the volume number of the record, followed by page number.

jury did not find that Dr. Block's deliberate indifference caused Dr. Miranda's death. The jury instructions (objected to by Respondent) let the jury decide against the County if the deliberate indifference of "any employee or official of El Paso County" deprived Dr. Miranda of his constitutional rights. (Cl.R. vol. VIII at 3472).

4. Petitioners correctly state that one of their allegations was that the County caused decedent's death by failing to give him medicine, but they mislead by omission by failing to include their other allegations that the death was caused by the jailers killing him by positional asphyxiation when they were transporting him from his cell to the clinic or that the nursing staff was negligent for the improper use of the syringe to apply medication. (Cl.R. vol. VIII at 3472).

5. Petitioners state, "The evidence is unclear as to whether Mr. Arvizu spoke Spanish . . . but suggests he did not." There is no evidence that suggests that jailer Arvizu didn't speak Spanish other than LVN Dominguez who had never heard him speak Spanish, and the evidence suggests that he did speak Spanish. (Ct.R. vol. 16 at 78.)

6. Petitioners state, "Captain Hernandez . . . testified that when a medical condition appeared at intake someone from the medical department would be called to complete the interview." Someone would be called from the medical department during intake only if a serious medical condition was indicated. Captain Hernandez did not testify that someone from the medical department would be called down to complete the interview whenever any medical condition is revealed during intake. He testified that if an inmate during the classification interview indicated an immediate need to

take medicine or an immediate medical problem, the interviewing officer would notify the clinic. (Ct.R. vol. 16 at 83-84, 127-128).

7. Petitioners state, "Dr. Miranda's widow testified that it had been prescribed . . . by a Dr. Martin Rodriguez in Juarez in 1991." Their citation to the record is to a different witness than Ms. Dorado. Instead Ms. Dorado specifically testified that Dr. Miranda self-prescribed the medicine. (Ct.R. vol. 12 at 155).

8. Petitioners claim that in the last day of Dr. Miranda's life, the jail authorities "unequivocally knew everything about Dr. Miranda that would have enabled them to save his life . . . " That is incorrect. (See ¶ 9. below). One of Plaintiffs' theories of the case is that Dr. Miranda might have been more forthcoming about his self-prescribed addiction to Ativan to another doctor such as Dr. Block (Ct.R. vol. 13 at 57). However this is pure speculation.

9. The Petitioners accuse the Texas Court of Appeals of "wrongly repeating assertions that Dr. Miranda concealed his medical condition." In fact, all of the facts included in the opinion by the Court of Appeals were taken from the record, often from Plaintiffs' own witnesses or evidence. For example the record clearly showed that Dr. Miranda was not truthful to the intake officer with regard to his medical condition. (Ct.R. 24 at P-12). The record also shows that decedent was not truthful in relating his medical history to LVN Dominguez. (Ct.R. vol. 12 at 79, 127, 128-29; vol. 13 at 59-62; vol. 15 at 177). Decedent never told any County personnel complete and truthful information about his medical condition (Ct.R. vol. 12 at 141-43, 147, 149-50, 153-55).

10. Petitioners omit several pertinent portions of Dr. Block's contract. It provided that he agreed to be bound by the rules applicable to the El Paso County Detention Facility as set out in the Commission on Jail Standards. (P. Ex. 55 at pg. 1). Further he reported to the Sheriff or his designated representative (*Id.* at pg. 2). Dr. Block was to work 25 hours a week at the jail and his time sheets were to be presented to the Sheriff or his designated representative for approval. (*Id.*) He was to assist the Facility in meeting its duties to inmates as stated in the jail's policy manual and also assist in developing and implementing policies to assure high quality medical and nursing care. (*Id.*) He also was to make recommendations to the Chief Deputy or his representative when unsatisfactory conditions of the health environment of the jail were observed by him. (*Id.* at pg. 3-4) The jail agreed to implement policies which assure high quality medical care. (*Id.* at pg. 4). Doctor Block had limits on establishing policy for the delivery of medical care at the jail. (Ct.R. vol. 10 at 74). Dr. Block did not set all the policies at the jail and operated within the jail policies. (Ct.R. vol. 10 at 95). The jailers were not under the control of Dr. Block. (Ct.R. vol. 10 at 109). See discussion of the contract in the Court of Appeal's decision, *County of El Paso, Texas v. Dorado,* 180 S.W.3d 854, 871-72 (Tex.App. – El Paso 2005, pet. denied) *petition for cert. filed,* ___ U.S.L.W. ___ (U.S. Sept 15, 2006) (No. 06-370).

11. Petitioners claim that there was no oversight or review of the medical staff. Again, this is incorrect. Captain Hernandez dealt with complaints from inmates concerning their medical care. If the medical staff did not follow jail procedure an administrative disciplinary investigation would

be done by the jail administration, with the assistance of the Medical Director, that could result in sanctions up to termination. (Ct.R. vol. 16 at 58-60).

12. Petitioners state that decedent "was in extremis on Sunday morning." This is incorrect. The evidence clearly showed that the first time decedent experienced a medical emergency was late Sunday night (Ct.R. vol. 15 at 128-29) when the jail and medical staff responded promptly and appropriately (Ct.R. vol. 9 at 125; vol. 11 at 243, 249; vol. 24 at Ex. P-26, P-27; vol. 14 at 22-23).

STATEMENT OF THE CASE

On Thursday night, February 27, 1997, the decedent, Dr. Eduardo Miranda, was arrested by officers of the El Paso Police Department. (Ct.R. vol. 27 at Ex. D-10). An outstanding capias, arising from a failure to appear in court for a then-ongoing "DWI" case, as well as other traffic violation warrants, served as the basis for Dr. Miranda's arrest. (*Id.*)

Dr. Miranda was admitted into "intake" in the El Paso County Jail, at about 1:25 a.m., on Friday, February 28, 1997. (*Id.*) The booking procedure occurred at about 9:17 a.m. the same day. (*Id.*) According to the "Classification Profile" form used by the El Paso County Sheriff's Department, Dr. Miranda appeared alert and responded "promptly and appropriately" to the questions which were asked of him during the classification procedure. (Ct.R. vol. 24 at Ex. P-12). Under the "Inmate Response" portion of the "Medical Screening Form," Dr. Miranda informed the screener that he had not been hospitalized or under a

doctor's care in the year prior to his arrest. (*Id.*) He also informed the screener that he had not been taking medication, or undergoing treatment, for any medical reason within the eighteen months prior to his arrest, even though he did specify that he had, at some point, suffered from convulsions. (*Id.*) Dr. Miranda worked as a trusty Friday and Saturday nights but did not tell jailer Morales that he suffered from convulsions or needed medication of any kind. (Ct.R. vol. 15 at 141).

On Saturday, Dr. Miranda was taken to the clinic after either he or his wife informed the jail that he needed medication for seizures. He received a two milligram dose of Ativan in the evening, based upon instructions from Dr. Harold Block, the Medical Director for the El Paso County Jail. (Ct.R. vol. 13 at 55-56; vol. 24 at Ex. P-24). Dr. Block based his prescription on information gathered from a phone call made by LVN Juan Dominguez, who was told by Dr. Miranda that he was taking Ativan regularly. (Ct.R. vol. 10 at 233-36; vol. 13 at 54). Dr. Miranda told LVN Dominguez that he had been taking the Ativan for six months as prevention for seizures. It was later learned from Dr. Miranda's wife that Dr. Miranda's typical dosage consisted of at least two to three pills during the day and six to eight pills per night (Ct.R. vol. 12 at 127) and that he had been self-prescribing Ativan for about six years for sleep problems. At no time was Dr. Miranda's full dosage of medication relayed to Dr. Block. (Ct.R. vol. 10 at 233; vol. 13 at 97-98).

On Sunday night, March 2, 1997, the "Medication Administration Record" indicates that Dr. Miranda's name was called out twice, in order to administer a second dosage of Ativan, but he did not answer and received no medicine. (Ct.R. vol. 24 at Ex. P-24). Three hours later,

detention officer Morales went to Dr. Miranda's cell in order to enlist him for a work detail and was alerted to the fact that Dr. Miranda was on the floor of the cell apparently having a seizure. (Ct.R. vol. 15 at 128-29). The rest of the cell-block was immediately locked-down for safety reasons, and other detention officers arrived at the scene. (Ct.R. vol. 9 at 118-19; vol. 14 at 85-87; vol. 15 at 128-29). The nurses' station on the tenth floor of the jail was immediately notified that an inmate appeared to be having a seizure. (Ct.R. vol. 14 at 22-23; vol. 27 at Ex. D-25). A member of the nursing staff was on the fourth floor within eight minutes, in order to check on Dr. Miranda's status. (*Id.*) As Dr. Miranda lay on his back, on the cell floor, the attending nurse attempted to determine his vital signs, but at that time, Dr. Miranda stood up, under his own power, and began walking around. (Ct.R. vol. 14 at 87-88; vol. 15 at 130-31).

A gurney was retrieved from the nurses' station, and the detention officers who were present began to try and persuade Dr. Miranda to get onto the gurney in order to be transported to the medical clinic for treatment. (Ct.R. vol. 9 at 119; vol. 15 at 135). Dr. Miranda reacted aggressively by physically resisting the officers' attempts to help him. (Ct.R. vol. 9 at 119-21, 131-32; vol. 14 at 25-27, 92-93; vol. 15 at 135-36). He was, however, eventually placed onto the gurney, on his back, with handcuffs and ankle-shackles being used to safely restrain him. (*Id.*) Although the detention officers managed to keep Dr. Miranda on the gurney, he continued to violently oppose their efforts until they arrived at the clinic. (Ct.R. vol. 9 at 131-35; vol. 14 at 93-94; vol. 15 at 137-38). There was no problem with his breathing as he was transported to the clinic. (*Id.*)

By 11:45 p.m., Dr. Miranda had reached the medical clinic and was turned over and injected with four milligrams of Ativan by a member of the nursing staff. (Ct.R. vol. 14 at 95-96; vol. 15 at 138-39; vol. 24 at Ex. P-29). Within a short period of time thereafter, he stopped breathing and lacked a discernable pulse. (*Id.*) Detention officers immediately began to perform cardiopulmonary resuscitation on Dr. Miranda, while the El Paso City Emergency Medical Services were notified of the situation. (Ct.R. vol. 15 at 139). An E.M.S. unit arrived at the jail complex at approximately 11:50 p.m. and departed, en route to a hospital. (Ct.R. vol. 24 at Ex. P-2). The attending emergency physician pronounced Dr. Miranda to be deceased at 12:25 a.m., having made a diagnosis of "cardiorespiratory arrest." (*Id.* at Ex. P-1).

Dr. Juan Contin, the Medical Examiner for El Paso County in 1997, performed the autopsy and drafted the subsequent report. (Ct.R. vol. 24 at Ex. P-3). Dr. Contin itemized seven "findings" as a result of the autopsy: 1) epileptiform seizure disorder (tongue bite); 2) abrasions and contusion of the right forehead; 3) bruises on the left elbow; 4) bruises on the right arm; 5) abrasions and bruises around both wrists; 6) fracture of the right, sixth rib; and 7) fatty metamorphosis of the liver. (*Id.*) The report contains Dr. Contin's official opinion as to the cause of Dr. Miranda's death: "It is the opinion of this examiner that this man died of cardiorespiratory arrest during an epileptiform seizure." (*Id.*) The Certificate of Death indicates that Dr. Miranda died as a result of an "epileptiform seizure," considered to be a "natural" death. (*Id.* at Ex. P-6).

REASONS FOR DENYING THE PETITION

I. The Texas Court of Appeals properly applied the standard of review.

Petitioners are attempting to make this case into a Fourteenth Amendment Due Process case by making the blanket assertion that the Texas Eighth Court of Appeals applied a different standard of review to this 42 U.S.C. § 1983 case than it applies to state claims. This is simply not true. It is notable that Petitioners did not cite to any Eighth Court of Appeals cases involving similar state law claims where a different standard of review was applied or where the same standard of review was applied differently than it was applied in this case. The Court of Appeals discussed federal law extensively concerning § 1983 cases, and again Petitioners can point to no place in the opinion where this federal law was cited incorrectly by the appellate court. Petitioners also fail to show where the state appellate court applied state substantive law to the federal issues. The Court of Appeals did apply the state standard of review in making its decision, which is a procedural matter. Petitioners have not attacked the state's standard of review nor have they claimed that utilizing the state standard of review was pre-empted by a federal standard of review in § 1983 cases. In fact, *Appellees' Motion for Rehearing* to the Eighth Court of Appeals specifically states, "This Court's opinion correctly cites to the no evidence standard of review, ... " (Appellees' Motion for Rehearing at 3).

The Texas Supreme Court decision in *City of Keller v. Wilson*, 168 S.W.3d 802 (Tex. 2005) was handed down while this case was pending in the appellate court. There is no showing by Petitioners that the appellate court did not follow the standard of review set forth in *Keller*. The

major evidentiary dispute in this case concerns what LVN Dominguez told Dr. Block. LVN Dominguez testified that he told Dr. Block that the inmate was taking six to eight milligrams of Ativan, of which two milligrams were taken at night. (Ct.R. vol. 13 at 54). He also testified that Dr. Block said he would come to the jail to see the inmate on Sunday morning. (*Id.* at 56). Dr. Block testified that LVN Dominguez only told him about the 2 mgs. at night and further that he told him he would see the inmate the next working day, Monday. (Ct.R. vol. 10 at 150, 233). It is uncontroverted that decedent gave incorrect information to LVN Dominguez and, even if Dr. Block was told everything LVN Dominguez had been told by Dr. Miranda, he would not have had a complete picture of Dr. Miranda's self-prescribed drug addiction.[2] If he had Dr. Miranda's

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[2] The County's attorney questioned Jessie Dorado about her husband's use of Ativan:

A. "He was taking Ativan throughout the night, approximately five to eight pills per night; sometimes one or two pills during the day as needed."

Q. And that's what you were aware of; is that correct?

A. Yes.

Q. But you weren't with him 24 hours a day, were you?

A. No.

. . .

Q. And you really don't know how many pills he may have taken between those hours?

A. That's true.

(Ct.R. vol. 12 at 127-28).

The County's attorney questioned Jessie Dorado about Dr. Miranda's use of Ativan and his honesty with her:

Q. But, honestly, can you sit here today and tell the ladies and gentlemen of this jury that you do not believe he was being truthful to you?

A. Yes, he wouldn't be truthful.

(Continued on following page)

Q. So, would you agree with me that, when you married Doctor Miranda, he was not being truthful with you about his health condition?

A. Yes.

(Ct.R. vol.12 at 130).

Reading from the LVN Dominguez' notes, the County's attorney continued with questions to Jessie Dorado:

Q. But regardless of where this information came from, it says – in quotations – "I developed convulsions six months ago and then three months ago" – unquote. Would that statement be true or untrue?

A. That statement would be untrue.

Q. Okay. The next line says, "I had a CAT scan, abnormalities, EEG was done with delta waves" – unquote. Would that statement be true or untrue?

. . .

A. I think he did have a CAT scan and an EEG done, but I don't know the outcomes of them.

Q. Okay. Right after that – in quotes – "Neurosurgeon Doctor Martin Rodriguez placed me on Ativan, two milligrams QHS" – unquote. Would that statement be true or untrue?

. . .

A. I don't know if he put him on Ativan. I know he kept him on Ativan.

Q. Who's "he"?

A. Doctor Navarrette.

Q. It says, "Doctor Martin Rodriguez."

A. No.

Q. So, my question is –

A. It's untrue. I'm sorry.

Q. Thank you. And you've previously testified that Doctor Martin Navarrette never put your husband on Ativan; is that correct?

A. That's correct.

Q. Your husband prescribed himself Ativan; correct?

A. Correct.

(Ct.R vol. 12 at 152-154).

complete medical information, Dr. Block testified he would have immediately ordered decedent into detox. (Ct.R. vol. 10 at 237). "Proper legal-sufficiency review prevents reviewing courts from substituting their opinions on credibility for those of the jurors, but proper review also prevents jurors from substituting their opinions for undisputed truth. When evidence contrary to a verdict is conclusive, it cannot be disregarded." *Keller*, 168 S.W.3d at 817. Here, the Court of Appeals did not substitute their opinions on the credibility of Dominguez and Block for those of the jurors. They merely acknowledged the obvious; a party cannot be liable under § 1983 for failing to recognize and treat a medical condition concealed by the inmate.[3]

The *Keller* decision stresses that the reviewing court must look at "all of the surrounding facts, circumstances, and conditions, not just individual elements or facts. . . . Reviewing courts assessing evidence of conscious indifference[4] cannot disregard part of what a party was conscious of." Here, the appellate court, in finding no deliberate indifference as a matter of law, looked at what Dr. Block

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[3] Petitioners declare that decedent would have no motive to conceal his condition. Any physician from another country wishing to practice medicine in the United States such as Dr. Miranda (Ct.R. vol. 12 at 73) would know that admitting a self-prescribed drug addiction to a law enforcement agency would pose a serious, if not insurmountable, obstacle to such hopes.

[4] "Conscious indifference" under Texas law has some overlapping elements with "deliberate indifference". The plaintiff must show that the defendant was consciously, specifically, knowingly, indifferent to his rights, welfare, and safety. In other words, the plaintiff must show that the defendant knew about the peril, but his acts or omissions demonstrated that he didn't care. *Wal-Mart Stores v. Alexander*, 868 S.W.2d 322, 325-26 (Tex. 1993).

and others were conscious of and that was an incomplete, untruthful medical history of Dr. Miranda. *Id.* at 817.

It was contested as to whether or not Dr. Block told Dominguez he would come in Sunday morning to see decedent (Ct.R. vol. 13 at 56; vol. 10 at 150), but there was no evidence that Dr. Block actually knew that decedent was at risk of serious harm and deliberately disregarded that risk by not coming in on Sunday. Seizures are not automatically a serious medical condition (Ct.R. vol. 10 at 143-44, 208-09). Dominguez did not tell Dr. Block there was an emergency (Ct.R. vol. 10 at 150). There was also no evidence that if Dr. Block had seen decedent on Sunday morning, anything he might have done would have prevented decedent's death. Appellees speculated that decedent would have been more truthful to a doctor than he had been to a nurse (Ct.R. vol. 11 at 278; vol. 13 at 57). If decedent had been completely honest with Dr. Block, Dr. Block probably would have sent him to the local county hospital for detox (Ct.R. vol. 10 at 237). There was no evidence that any action of Dr. Block would have prevented the seizure on Sunday night. People can have seizures even if they are on medicine (Ct.R. vol. 10 at 224-25; vol. 11 at 226; vol. 14 at 164). Dr. Contin testified that Ativan is not usually prescribed for chronic treatment of seizures (Ct.R. vol. 14 at 136-37). Even if treatment is inadequate for the severity of a medical condition or is unsuccessful, that does not indicate that the doctor committed willful wrongs or malicious acts. *Stewart v. Murphy*, 174 F.3d 530, 538 (5th Cir. 1999).[5]

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[5] Several cases have been cited by Petitioners that supposedly support their contention that there is no difference in determining deliberate indifference between denial of all medical care and delay in

(Continued on following page)

There was no proof that any of the medical personnel knew about decedent's real condition. Until he had a seizure on Sunday night, decedent never appeared ill or in any medical distress. (Ct.R. vol. 13 at 115-16; vol. 15 at 125). Although he worked as a trusty with Detention Officer Morales on Friday and Saturday night, decedent never asked him for medication (Ct.R. vol. 15 at 127, 141).

In bolstering their argument that Dr. Block acted with deliberate indifference, Petitioners have attempted to show that Dr. Block was a "bad apple". Allegedly he referred to inmates as "scumbags", did not send inmates to the hospital for detox, lined up large numbers of naked inmates to do their physical exams, etc. (Ct.R. vol. 13 at 57-58, 72-74). However there was no evidence that any of these alleged acts caused any inmate to suffer serious harm or resulted in constitutional violations of any detainee's rights. These "bad acts" were also irrelevant to this case. Dominguez testified that Dr. Block said that certain medicines would not be prescribed to inmates because of the budget (Ct.R. vol. 13 at 74); however, no evidence was introduced as to what these medicines were

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providing such care. The facts in these cases differ greatly from the facts in the present case. They fall into two categories: they involve acute medical situations, see *Cooper v. Dyke*, 814 F.2d 941 (4th Cir. 1987) (gunshot wound); *Plemmons v. Roberts*, 439 F.3d 818 (8th Cir. 2006) (heart attack); or they involve lengthy delays of weeks or months, see *Miranda v. Munoz*, 770 F.2d 255 (1st Cir. 1985) (three week delay); *Duncan v. Duckworth*, 644 F.2d 653 (7th Cir. 1981) (10 month delay in diagnosing broken wrist and then an additional year delay in providing treatment); *Jett v. Penner*, 439 F.3d 1091, 1095 (9th Cir. 2006) (19 months between injury and treatment); and *Mandel v. Doe*, 888 F.2d 783 (11th Cir. 1989) (denial of proper medical diagnosis and treatment for three months until inmate released from jail). The *Miranda* case cited by Petitioners is also inapposite to the issues in this case in that all the defendants were individuals, not governmental entities.

and what effect, if any, their restriction had on inmate health. Any such list certainly did not include Ativan, because Ativan was prescribed for decedent, both in pill form and by injection. Dr. Block was also criticized for not sending inmates to the hospital; although this was later clarified that he only wanted to be notified first, except in emergencies when the medical staff could call E.M.S. prior to notifying Dr. Block (as was done in this case). (Ct.R. vol. 13 at 74). Plaintiffs' Exhibit 54 (Ct.R. vol. 25 at Ex. P-54) shows that inmates were frequently sent to hospitals as a result of seizures and decedent was transported to the hospital shortly after suffering his heart attack. The County policy clearly shows that medical referrals and emergency services are to be provided to inmates (Ct.R. vol. 27 at Ex. D-78). It is a sad commentary on Petitioners' paucity of evidence that they are relying on a statement, albeit however inappropriate, made by Dr. Block during trial six years after decedent's death as proof of his deliberate indifference.

In *Keller* the Texas Supreme Court goes on to note:

> Undisputed contrary evidence may also become conclusive when a party admits it is true. Thus, a claimant's admission that he was aware of a dangerous premises condition is conclusive evidence he needed no warning about it. Similarly, an ex-employee's admission that she obtained other employment may prove conclusively that she did not detrimentally rely on a defendant's promise to re-hire her. And jurors may not find that an indictment was based on a defendant's misleading report when the district attorney admits it was his own mistake. *Keller*, 168 S.W.3d at 815.

Jesse Dorado admitted under oath that her husband had not been truthful when discussing his medical condition with either the jailers or the medical staff and she should not be allowed to have this Court or the Texas Eighth Court of Appeals disregard her own testimony.

The cases cited by Petitioners to support their Fourteenth Amendment claim do not stand up to close scrutiny. In *Dice v. Akron, Canton & Youngstown R.R.*, 342 U.S. 359 (1952), the plaintiff was able to point to a specific state law that deprived him of his right to a jury trial on an important component of his federal law case. In *Felder v. Casey*, 487 U.S. 131 (1988), the plaintiff again was able to identify a state statute, a notice provision, that conflicted with the exercise of federal rights under § 1983 by impermissibly imposing an exhaustion requirement. *Howlett v. Rose*, 496 U.S. 356 (1990) likewise dealt with the application by the state court of the state law regarding sovereign immunity in a § 1983 case. *Republic Pictures v. Kaplan* involved an Iowa law which specifically shortened the statute of limitations for the bringing of an action under federal law than that prescribed for similar actions based on state law. *Republic Pictures v. Kaplan*, 327 U.S. 757 (1946), affirming *Republic Pictures v. Kappler*, 151 F.2d 543 (8th Cir. 1945). None of these cases present a scenario remotely similar to the present case.

This issue is also not the proper subject for the granting of certiorari because this Court's decision, even if favorable to Petitioners, would not change the ultimate outcome of this case. In addition to finding no evidence of deliberate indifference, the appellate court also held that "[t]he facts of this case do not present an 'official policy' . . . " *County of El Paso v. Dorado*, 180 S.W.3d at 865. This holding has not been attacked in the Petition for Writ of

Certiorari. It is an essential element of Petitioners' case. "[I]t is when execution of a government's policy or custom, whether made by its lawmakers or by those whose edicts or acts may fairly be said to represent official policy, inflicts the injury that the government as an entity is responsible under § 1983." *Monell v. Dep't of Soc. Servs.*, 436 U.S. 658, 694 (1978). Without sufficient evidence of an official policy or custom that caused their injuries, Petitioners cannot hope to hold Respondent liable.

Petitioners are trying to have this Court do that which is discouraged by Supreme Court Rule 10.[6] Petitioners admit that the Eighth Court of Appeals correctly stated the proper standard of review, they merely disagree with its application.

II. The Petitioners waived their right to have Dr. Block declared as the policymaker for the County when they never asked the Trial Court for such a finding and never requested that the Trial Court instruct the jury as to the appropriate policymaker.

Petitioners waived their right to have Dr. Block declared as the final policymaker in this case. The jury charge question relating to Petitioners' § 1983 claim asked:

> ***Did any employee or official*** of the Defendant EL PASO COUNTY deprive Dr. Eduardo Miranda of his constitutional right to receive adequate medical care while confined as a pretrial

[6] A petition for a writ of certiorari is rarely granted when the asserted error consists of erroneous factual findings or the misapplication of a properly stated rule of law. Sup. Ct. R. 10.

> detainee at the El Paso County Jail with deliberate indifference to his serious medical needs, which resulted from a policy, custom or practice adopted or maintained by the Defendant EL PASO COUNTY with deliberate indifference to Dr. Eduardo Miranda's constitutional rights that had a direct causal link to the occurrence in question? (emphasis added). (Cl.R. vol. VIII at 3472).

Earlier the jury charge instructed the jury that the element of "deliberate indifference to the serious medical needs of Dr. Eduardo Miranda" was to be evaluated by "a subjective analysis of ***the jail and medical personnel*** of the Defendant El Paso County." (emphasis added). (Cl.R. vol. VIII at 3468-69). The further instructions made it clear that the acts or omissions of a "**jail or medical official or employee**" would satisfy this element. (emphasis added). (*Id.*) Additionally, the Trial Court told the jury that "at all relevant times ***the medical and jail personnel*** .... acted in their official capacities ... and ... under color of state law." (emphasis added). (*Id.* at 3467-68).

The jury charge also instructed the jury:

> The failure to provide proper training may fairly be said to represent a policy for which the Defendant El Paso County is responsible if in light of the duties assigned to specific officers or employees, the need for more or different training is so obvious, and the inadequacy so likely to result in the violation of constitutional rights, that the policymakers can reasonably be said to have been deliberately indifferent to the need. (*Id.* at 3470).

There was no definition of "policymakers" in the charge and the trial court did not identify for the jury who the appropriate "policymakers" were, even though the County specifically requested that the Trial Court make a legal determination of the policymaker. (Cl.R. vol. VIII Charge at 3527, Defendant's Motion at 3526-27). The Trial Court did refer to a policy "officially adopted and promulgated by the county's law-making officers or by an official to whom the lawmakers have delegated policy-making authority . . . ", but did not further define or explain who those law-making officers were. (Cl.R. vol. VIII at 3470).

Petitioners never asked the Trial Court to find that Dr. Block was the final policymaker for the County nor did they request a jury instruction to that effect.[7] Although Respondent did ask the Trial Court for proper instructions regarding the policymaker,[8] none of Respondent's requested instructions, definitions and questions to the jury were included in the Court's Charge, which appears to be solely that of the Plaintiffs' submission. (Ct.R. vol. 17 at 18).

In the case of *Jett v. Dallas I.S.D.*, 491 U.S. 701 (1989), this Court held that the determination of who is a final policymaker is a question of law, to-wit:

> In *Praprotnik*, the plurality reaffirmed the teachings of our prior cases to the effect that "whether a particular official has 'final policymaking

[7] See Plaintiffs' First Amended Proposed Charge of the Court. (Cl.R. vol. VIII at 3489).

[8] See Defendant's Second Amended Requested Jury Instructions, (Cl.R. vol. III at 1234; Defendant's Requested Jury Instruction No. 3, Cl.R. vol. VIII at 3525-3526; and Defendant's Requested Jury Instruction No. 4; *Id.* at 3527).

> authority' is a question of state law." ... [T]he identification of those officials whose decisions represent the official policy of the local governmental unit is itself a legal question to be resolved by the trial judge *before* the case is submitted to the jury. Reviewing the relevant legal materials, including state and local positive law, as well as "'custom or usage' having the force of law," ... the trial judge must identify those officials or governmental bodies who speak with final policymaking authority for the local governmental actor concerning the action alleged to have caused the particular constitutional or statutory violation at issue.... (citations omitted). *Id.* at 737.

The law is very clear that the trial court is to determine who is the appropriate policymaker and instruct the jury in this regard. In the Court below, Petitioners contended that the Trial Court complied with this mandate by simply referring to the "policymakers" a couple of times in the jury charge. Like the jury charge in the *Webster* case, the Trial Court's instructions allowed the jury to speculate whether "any employee or official of the Defendant"[9] could be policymakers and risked violating the prohibition against fixing municipal liability on the basis of *respondeat superior*. *Webster v. City of Houston*, 735 F.2d 838, 842 (5th Cir. 1984) This is the precise reason why this Court has mandated that the trial court instruct the jury on who is the policymaker.

> Municipalities cannot be expected to predict how courts or juries will assess their "actual power structures," and this uncertainty could easily

[9] *See Question One, Charge of the Court*, (Cl.R. vol. VIII at 3464).

> lead to results that would be hard in practice to distinguish from the results of a regime governed by the doctrine of respondeat superior. It is one thing to charge a municipality with responsibility for the decisions of officials invested by law, or by a "custom or usage" having the force of law, with policymaking authority. It would be something else, and something inevitably more capricious, to hold a municipality responsible for every decision that is perceived as "final" through the lens of a particular factfinder's evaluation of the city's "actual power structure." *St. Louis v. Praprotnik*, 485 U.S. 112, 125 (1988).

III. The Texas Court of Appeals properly ruled that the Sheriff was the final policymaker for the jail.

The Texas Court of Appeals correctly found that the Sheriff was the appropriate final policymaker in this case. Petitioners accuse the Court below of ignoring this Court's rulings that there can be more than one policymaker and that policymaking authority can be delegated. On the contrary, the appellate court discussed these issues at length; they did not ignore or reject these principles, they simply decided that Petitioners had not proven that Dr. Block was a policymaker in lieu of or in addition to the Sheriff or that the Sheriff had delegated policymaking authority to him.

Whether a particular official has final policymaking authority is a question of *state law*. *Jett*, 491 U.S. at 737. The Fifth Circuit has determined that in Texas a sheriff is the final policymaker for a county for those areas within his statutory authority, including operating the jail. In Texas, the county sheriff is the county's final policymaker

in the area of law enforcement, not by virtue of delegation by the county's governing body but, rather, by virtue of the office to which the sheriff has been elected.[10] *Turner v. Upton County*, 915 F.2d 133, 136-37 (5th Cir. 1990); *Mowbray v. Cameron Count* , 274 F.3d 269, 278 (5th Cir. 2001); *Williams v. Kaufman County*, 352 F.3d 994 (5th Cir. 2003). *See also Colle v. Brazos*, 981 F.2d 237 (5th Cir. 1993) (County sheriff is appropriate policymaker in suit involving the death of an inmate allegedly for denial of adequate medical treatment.)

Petitioners point to an attorney general's opinion (see n.11 below) and to Texas law requiring a person to have a medical license before they practice medicine. Respondent agrees that is the law; but Respondent does not agree that this is sufficient to make every doctor who works for a governmental entity a "final policymaker" for every medical decision made by the doctor. As this Court stated in the *Gamble* case,

> [T]he question whether an X-ray – or additional diagnostic techniques or forms of treatment – is indicated is a classic example of a matter for medical judgment. A medical decision not to order an X-ray, or like measures, does not represent cruel and unusual punishment. At most it is medical malpractice, and as such the proper forum is the state court under the Texas Tort

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[10] (a) The Sheriff of each county is the keeper of the county jail. The sheriff shall safely keep all prisoners committed to the jail by a lawful authority, subject to an order of the proper court.

(b) The sheriff may appoint a jailer to operate the jail and meet the needs of the prisoners, but the sheriff shall continue to exercise supervision and control over the jail. TEX. LOCAL GOV'T CODE ANN. § 351.041 (Vernon 2005).

Claims Act. *Estelle v. Gamble*, 429 U.S. 97, 107 (1976).

Taking Petitioners' argument to its logical conclusion, every physician working for a governmental entity in Texas (and in every other state that limits the practice of medicine to licensed physicians) will be a final policymaker for the entity for every medical decision the physician makes. In fact, any governmental employee who is required to be licensed to practice a profession, such as doctors, dentists, engineers and attorneys, would subject the entity to liability for any decision they made within the scope of their license.

The courts have clearly distinguished between policymaking authority and decision making authority. Dr. Block had decision making authority, but that did not make him a final policymaker for purposes of § 1983. Dr. Block also exercised discretion but that does not make him a final policymaker. "If the mere exercise of discretion by an employee could give rise to a constitutional violation, the result would be indistinguishable from respondeat superior liability." *Praprotnik*, 485 U.S. at 126; *see also Jett v. Dallas I.S.D.*, 7 F.3d 1241, 1246-47 (5th Cir. 1993).

In the *Bennett* case cited by Petitioners, the Fifth Circuit stated, "Liability must rest on official policy, meaning the city government's policy and not the policy of an individual official." *Bennett v. Slidell*, 728 F.2d 762, 769 (5th Cir. 1984). Although the government can delegate policy, "the delegation of policymaking authority requires more than a showing of mere discretion or decision making authority on the part of the delegee." *Id.* at 769.

Like the plaintiffs in *Rivera v. Houston I.S.D.*, 349 F.3d 244, 247 (5th Cir. 2003), Appellees have not cited any

Texas law empowering the sheriff to delegate his exclusive policymaking authority. In *Rivera* the plaintiffs were trying to establish a school principal as a policymaker on a delegation theory. In rejecting their argument, the Fifth Circuit stated: "[t]his delegation of decision-making authority does not negate the fact that both under Texas law, and the Board's own policies, final policymaking authority lies exclusively with the Board." *Id.* at 248. Citing to *Praprotnik*, 485 U.S. at 126, the court states that a federal court would not be justified in assuming that municipal policymaking authority lies somewhere other than where the applicable law purports to put it. The *Rivera* court made no such assumption and held that the school board is the one and only policymaker for HISD. Texas law is equally clear that the county sheriff is the ultimate authority with regard to the county jail. TEX. LOCAL GOV'T CODE ANN. § 351.041 (Vernon 2005)[11]

In *Worsham v. City of Pasadena*, the Fifth Circuit found that the mayor and public works director were not the final policymakers in that there was a review provided of their decision. *Worsham v. City of Pasadena*, 881 F.2d

[11] Petitioners cite to a Texas Attorney General's Opinion that distinguishes between the respective responsibilities and authorities of county commissioners courts and sheriffs with regard to the operation of jails. It holds that the commissioners court has the authority to contract with an outside physician, but the sheriff has the authority to schedule the physician's services at the jail, which is precisely what happened in this situation. The El Paso County Commissioners Court contracted with Dr. Block and the Sheriff set his schedule. However, Appellees put on no evidence to show that Commissioners Court was deliberately indifferent in contracting with Dr. Block to provide such services and never requested the trial court to instruct the jury that the appropriate final policymaker was the Commissioners Court. Op. Tex. Att'y Gen. No. DM-111.

1336 (5th Cir. 1989). In the present case, there was ample testimony that the Sheriff's Department and jail had a very active grievance procedure that frequently reviewed the actions of the medical staff and could result in the termination of such staff in the appropriate circumstances. (Ct.R. vol. 16 at 57-60, 118-20). Dr. Block not only reported to the Sheriff, but Captain Hernandez testified that his office received complaints on a regular basis concerning medical care. (Ct.R. vol. 16 at 118, 120). In the Court below, Petitioners even refer to this testimony in their Statement of Facts. Petitioners' assertion that Dr. Block must be a final policymaker because there was no review of his actions is not supported by the record which clearly shows the contrary.

The decision in *Putnam v. Town of Saugus*, 365 F. Supp. 2d 151 (D. Mass. 2005), is entirely consistent with the appellate court decision in this case. In the *Putnam* case, the municipal charter specifically vested the Town Manager, not the Board of Selectmen, with the exclusive legal authority to make the appointment of temporary and permanent police chief under local law. *Id.* at 183. Citing *Praprotnik* at 475 U.S. at 124-31 (plurality opinion), the Massachusetts court explained, "[F]or an official to have final policymaking authority, their discretion cannot be 'constrained by policies not of that official's making.' *Id.* at 127 (plurality opinion). When an official is so constrained, 'those policies, rather than the subordinate's departures from them, are the act of the municipality.' *Id.* (plurality opinion)." *Putnam*, 365 F. Supp. 2d at 183. This reasoning applies to the facts before this Court because ample testimony and physical evidence showed that Dr. Block's decision making authority in his role of Medical Director of the El Paso County Detention Facility was limited and

that the Sheriff had established extensive policies for the provision of medical care preceding Dr. Block's employment. (Ct.R. vol. 10 at 74, Dr. Block establishes policy for delivery of medical care "within certain limits"; vol. 10 at 88-89, Dr. Block did not set up LVN policy; vol. 10 at 77, 101, Dr. Block "participates" in training; vol. 16 at 153-54, If Health Services Plan conflicts with Sheriff's Department policies it would have to be reviewed and resolved as quickly as possible; *Id.* Up until the point there's a medical issue, the [jail] staff can intervene and prevail in that situation; vol. 16 at 57-60, Medical personnel who fail to follow Sheriff's medical policy are subject to range of sanctions from counseling to termination; vol. 16 at 39-55 Discussion of Sheriff's Health Services Plan; vol. 27 at Ex. D-78, Excerpt from Health Services Plan; vol. 24 at Exs. P-22 and P-23, Excerpts from Nursing Protocols).

At trial and in their pleadings, Plaintiffs took a scattershot approach to their § 1983 cause of action. Their allegations pointed to numerous individuals whose acts or omissions are the subject of their complaints: jailers -- Pablo Arvizu, Jesus Morales, Miguel Liano, Robert Lovato, Alejandro Garcia, and Richard Heaton; and medical personnel – Vivian Perez, Junette Davis, Cody Tellez, Juan Dominguez and Dr. Harold Block. The jury charge certainly allowed the jury to make its finding against the County based on the actions or omissions of any of these persons.

At the appellate level, Petitioners finally narrowed their theories of recovery against the County to two claims: (1) Dr. Block did not come to the jail on Sunday to see decedent and (2) the jailers killed decedent by positional asphyxia when transporting him to the clinic. They contend that Dr. Block's failure to see decedent in person

on Sunday amounted to a consciously indifferent failure to provide medical care to decedent that is binding on the County because Dr. Block was a final policymaker for the County. They further contend that the jailers killed decedent by positional asphyxia as a result of improper training. Although Respondent does not concede that Dr. Block was the final policymaker with regard to the provision of medical services at the jail, there was certainly no evidence that he had any policymaking authority delegated to him with regard to the training of the jailers. Petitioners have not argued that the Sheriff is not the appropriate policymaker in this regard.

Thus this issue also should not form the basis for granting the Petition. Even if this Court were to find that the Texas appellate court decision improperly held that Dr. Block was not a final policymaker as to his medical treatment of decedent, the jury verdict would still be reversed because there was no evidence presented concerning any deliberate indifference on the part of the Sheriff in the training of the jailers.

CONCLUSION

The Petition for Writ of Certiorari should be denied.

Respectfully submitted,

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